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Supreme Court of the United States

OCTOBER TERM, 1958.

No. 730

ALICE S. CAMPBELL, as Administratrix of the Estate of WILLIAM R. CAMPBELL, also known as William Richard Campbell, deceased; and TOWNSEND L. SCHOONMAKER, as Administrator of the Estate of ALFRED G. SCHOONMAKER, also known as Alfred Garrison Schoonmaker, Jr., deceased,

Petitioners,

vs.

ROLANDO J. MATTEUCCI, Administrator of the Estate of IVAN R. SPONG, deceased,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

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TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioners, Alice S. Campbell and Townsend L. Schoonmaker, by their attorneys, respectfully pray that a Writ of Certiorari be issued out of and under the seal of this Court to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in this cause on November 29, 1958.

Opinions Below.

No written opinion was rendered by the United States District Court for the District of New Mexico. The opinion

of the Court of Appeals is reported in 261 F. 2d 225 and appears in the Record on Certiorari at pages 3 and 4 and a printed copy thereof is appended to this petition.

Statement of Jurisdiction.

The judgment of the Court of Appeals for the Tenth Circuit, sought to be reviewed, was dated November 29, 1958, and entered on the same day.

The jurisdiction of this Court is invoked under 28 USC Sec. 1254(1).

Question Presented for Review.

Do Sections 22-20-1, 22-20-2, 22-20-3 and 22-20-4 of the New Mexico Statutes Annotated, of 1953, as construed by the District Court of New Mexico, granting to a pilot or driver of a common carrier immunity from all civil liability for wrongful death, deny the equal protection of the laws guaranteed by the United States Constitution and the Constitution of New Mexico, as well as violate the prohibition against special privileges and immunities contained in the State Constitution.

Constitutional and Statutory Provisions Involved.

The following constitutional and statutory provisions are involved and the pertinent parts are quoted herein as follows:

The Constitution of the United States:

"AMENDMENT XIV.

"SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor

shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Constitution of the State of New Mexico:

Article II, Section 18, provides

"No person shall be deprived of life, liberty or property without due process of law; nor shall any person be denied the equal protection of the laws."

Article IV, Section 26, provides

"The legislature shall not grant to any corporation or person any rights, franchises, privileges, immunities or exemptions, which shall not, upon the same terms and under like conditions, inure equally to all persons or corporations; no exclusive right, franchise, privilege or immunity shall be granted by the legislature or any municipality in this state."

New Mexico Statutes Annotated, 1953:

"SECTION 22-20-1. Whenever the death of a person shall be caused by the wrongful act, neglect or default of another, although such death shall have been caused under such circumstances as amount in law to a felony, and the act, or neglect, or default, is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who or the corporation which, would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured.

"SECTION 22-20-2. Every action instituted by virtue of the provisions of this and the preceding section must be brought within three (3) years after the cause of action shall have accrued.

"SECTION 22-20-3. Every such action as mentioned in Section 1821 (22-20-1) shall be brought by

and in the name or names of the personal representative or representatives of such deceased person, and the jury in every such action may give such damages, compensatory and exemplary, as they shall deem fair and just, taking into consideration the pecuniary injury or injuries resulting from such death to the surviving party or parties entitled to the judgment, or any interest therein, recovered in such action, and also having regard to the mitigating or aggravating circumstances attending such wrongful act, neglect or default. The proceeds of any judgment obtained in any such action shall not be liable for any debt of the deceased: Provided, he or she shall have left a husband, wife, child, father, mother, brother, sister or child or children of the deceased child, but shall be distributed as follows:

* * * * * *

"SECTION 22-20-4. Whenever any person shall die from any injury resulting from, or occasioned by the negligence, unskillfulness or criminal intent of any officer, agent, servant or employee, whilst running, conducting or managing any locomotive, car, or train of cars, or of any driver of any state (stage) coach or other public conveyance, while in charge of the same as driver; and when any passenger shall die from injury resulting from or occasioned by any defect or insufficiency in any railroad, or any part thereof, or in any locomotive or car, or in any stage coach, or other public conveyance, the corporation, individual or individuals, in whose employ any such officer, agent, servant, employee, engineer or driver, shall be at the time such injury was committed, or who owns any such railroad, locomotive, car, stage coach, or other public conveyance, at the time any injury is received, resulting from, or occasioned by any defect or insufficiency above declared, shall, forfeit and pay for every person or passenger so dying, the sum of ten thousand dollars ($10,000), which may be sued and recovered; first, by the husband or

wife of the deceased; or second, if there be no husband or wife, or if he or she fails to sue within six (6) months after such death then by the minor child or children of the deceased; or third, if such deceased be a minor and unmarried, then by the father and mother; or fourth, if the deceased be over twenty-one (21) years of age and unmarried, by a dependent father or mother or dependent brother or sister, who may join in the suit; and each shall have an equal interest in the judgment; or if either of them be dead, then by the survivor. In the event there are no such persons entitled to sue or in the event suit is not brought by any such persons within nine (9) months after such death, suit may be brought by the personal representative or representatives of such deceased person."

Statement of the Case.

The judgment of the Court of Appeals for the Tenth Circuit, sought to be reviewed, affirmed the judgment of the District Court for New Mexico striking that part of the complaint of the plaintiffs alleging claims for wrongful death. The basis of the District Court's jurisdiction was diversity of citizenship of the parties and the amount involved exceeding $3,000.

This is an action for the wrongful death of William R. Campbell, also known as William Richard Campbell, and of Alfred G. Schoonmaker, also known as Alfred Garrison Schoonmaker, passengers on a Trans World Airlines airplane which crashed while off course in the Sandia Mountains on a flight from Albuquerque to Santa Fe, New Mexico. All passengers and crew were killed. The plaintiffs-appellants, residents of the States of New Jersey and California, respectively, as administrators of the estates of William R. Campbell, also known as William Richard Campbell, and of Alfred G. Schoonmaker, also known as Alfred Garrison Schoonmaker, brought suit under Section

22-20-1, New Mexico Statutes, Annotated, 1953, against Rolando J. Matteucci, a resident of New Mexico, as administrator of the estate of Ivan R. Spong, the pilot of the aircraft involved, in the United States District Court for the District of New Mexico, alleging that death had been proximately caused by the negligence, recklessness and carelessness of the pilot Spong, and his violation of applicable laws and regulations, in the operation of said airplane, and that he was the captain of the aircraft and in full charge of its operation and its crew, and in each case demanding damages in excess of $10,000.00. The defendant moved in the District Court for a dismissal of the action on the ground that Section 22-20-4, New Mexico Statutes, Annotated, 1953, is the exclusive statute under which an action for wrongful death may be brought when the death is caused as a result of the negligent operation of a public conveyance by the driver, or in the instant case, by the pilot thereof, and that no action exists under the laws of New Mexico against the pilot.

The District Court granted defendant's motion and dismissed that part of the complaint seeking recovery for the wrongful deaths. Plaintiffs thereupon appealed to the Circuit Court of Appeals for the Tenth Circuit. The argument of the appeal was duly had and the Tenth Circuit Court of Appeals affirmed the judgment of the District Court.

Argument and Reasons for Allowance of the Writ.

1. The decision of the Circuit Court of Appeals for the Tenth Circuit affirming the judgment of the District Court construes the statutes of New Mexico so as to grant civil immunity to the driver or pilot of a common carrier whose negligence is alleged to have caused the death of plaintiff's decedents, in direct violation of the provisions

of the Fourteenth Amendment to the United States Constitution forbidding any state to deny the equal protection of the laws to any person within its jurisdiction. This is a decision on an important question of interpretation of the equal protection clause of the United States Constitution, Fourteenth Amendment, which has not been, but should be, settled by this Court.

It is of the greatest importance to the constantly increasing hundreds of thousands of passengers carried over all parts of the United States by common carriers each of whom trustfully places his life and safety in the nearly absolute control of the pilot when he boards the aircraft. The pilots of such air carriers are often the operative cause of injuries to or the death of passengers on the aircraft. This is also true as to the operators of other public conveyances by highway, railway and over water. To grant such pilots and operators civil immunity from personal liability for their negligence resulting in death is a radical departure from the well established rules of civil liability for negligence, especially where civil liability remains undisturbed as to non-fatal personal injuries. Is it constitutional to reward a tort feasor with civil immunity from liability for the deaths caused by his tort so that he will suffer greater financial injury the more lives he saves.

2. The decision is also a precedent for extensive latitude for special interest state legislation heretofore believed to be forbidden by the equal protection clauses in state and federal constitutions. The most immediate result could be the granting of immunity from personal liability for wrongful death caused by negligence, gross negligence, criminal act or homicidal intent for persons in such categories as the following: state employees, federal employees, law enforcement officers, employees of regulated public utilities, employees of hospitals, physicians, labor union

officials, licensed operators of motor vehicles, aircraft and seagoing vessels, employees of banks, drivers of milk delivery vehicles, farmers, veterans and many others who for any constitutional reason can be specially classified by the legislatures.

The decision authorizing the granting of the immunity involved in the case at bar is also a precedent for the granting of other special privileges and immunities bearing no more reasonable relation to a proper legislative objective than that involved in this case. Since the right of action for wrongful death did not exist at common law and exists only by reason of state statute, the precedent created here is necessarily that the legislatures have the right to discriminate "unreasonably" in the granting of rights, privileges, immunities and remedies (and possibly in the imposition of burdens) as to rights and obligations which did not exist at common law. Laws relating to adoption, declaratory judgments, paternity, arbitration, public housing, elections, protection of civil rights, labor unions, public schools and the like, which are not based on the rules of the common law, could well be affected.

3. The decision of the Circuit Court of Appeals has decided an important question of interpretation of the Constitution of the State of New Mexico in a way which conflicts with the State Constitution. The Supreme Court of New Mexico, which is its highest appellate court, has never passed upon the constitutionality of the statutes in question here. Article II, Section 18, of the State Constitution provides

> "No person shall be deprived of life, liberty or property without due process of law; nor shall any person be denied the equal protection of the laws."

Article IV, Section 26, of the State Constitution reads

> "The legislature shall not grant to any corporation or person any rights, franchises, privileges, immunities or exemptions, which shall not, upon the same terms and under like conditions, inure equally to all persons or corporations; no exclusive right, franchise, privilege or immunity shall be granted by the legislature or any municipality in this state."

It is submitted that the decision of the Circuit Court of Appeals constitutes an interpretation of the Constitution of the State of New Mexico which appears to be in direct conflict with the express provisions of said Constitution and not based on any similar interpretation by the Supreme Court of the State.

In the case of *Re Reilly's Estate* (*Walker* v. *Matteucci*) 63 N. M. 352, 319 P. 2d 1069 (1957), cited by the Court of Appeals as authority for decision herein, the New Mexico Supreme Court decided, in an action for wrongful death growing out of the same accident as is here involved, that common carriers by air are included with other common carriers within the terms of the statute ("other public conveyance"), and decided also that upon any set of facts bringing a case within the provisions of Section 22-20-4 recovery can only be had under that section and no action for causing death by negligent operation of a public conveyance will lie against the driver or pilot thereof. In that case, however, the constitutionality of Section 22-20-4 as interpreted by that court was not raised below and therefore the Supreme Court did not, and could not, consider that question. The constitutionality of that section as interpreted by the Court in *Re Reilly's Estate* and as urged by defendant-appellee in this action has been raised by the plaintiff-appellant below and is properly before this Court.

The constitutional question before this Court may be stated as follows: If Section 22-20-4 is interpreted to mean that where death is caused by the negligence of the driver or pilot of a public conveyance, such driver and pilot is immune from suit for damages resulting from such death, then said statute is unconstitutional, for said section of said statute grants to such driver or pilot a special immunity and privilege contrary to the special prohibition in the Constitution of New Mexico and equal-protection clauses of the Constitution of the United States and of New Mexico.

The applicable provisions of the Constitution of the United States are as follows:

"AMENDMENT XIV.

"SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The construction placed upon Sections 22-20-4 and 22-20-1, New Mexico Statutes Annotated, 1953, by both the District Court of New Mexico and the United States Court of Appeals for the Tenth Circuit, which construction grants to the operator of a common carrier immunity from civil liability for wrongful death, regardless of whether such death is the result of ordinary negligence, wanton negligence or felonious act on the part of such operator, violates the equal-protection clause of the Fourteenth Amendment of the United States Constitution quoted above.

In the case of *President and Directors of Georgetown College* v. *Hughes*, 130 Fed. 2d 810 (D. C. Circ. 1942), the Court stated (at p. 812) the basic principle of such cases as that at bar:

> "We start with general principles. For negligent or tortious conduct liability is the rule. Immunity is the exception. Human beings ordinarily are responsible for their own legally careless action. They respond also for negligent harms inflicted by their agents and employees. So do business corporations. Likewise trustees and other fiduciaries generally are liable for their own negligence in administration and operation of the business or property committed to their control. *Respondeat superior* more and more has made them, as it has private corporations, responsible for wrongs done by their inferior functionaries."

The District Court below in granting defendant's motion to dismiss the complaint decided that no action would lie against the pilot of a Trans World Airlines plane for the negligent killing of passengers of that plane in New Mexico, because it construed the provisions of Section 22-20-4, New Mexico Statutes Annotated, 1953, as excluding from liability any pilot of a common air carrier. This construction of the statute means that anyone killed by the negligence of the pilot of a common air carrier cannot recover through his legal representatives for his wrongful death except in a limited amount ($10,000) and then only against the owner or operator of that airplane.

A careful reading of Sections 22-20-4 and 22-20-1 shows that the legislature intended that whenever the death of a person was caused by the negligence of anyone, a person or a legal entity such as a corporation, such person or legal entity shall be liable in an action for damages and that

where such death is caused by the negligence of the pilot or driver of a public conveyance, there is an added benefit to the legal representatives of the deceased, in that $10,000, no more and no less, shall be forefeited to such legal representatives by the corporation or individual in whose employ such negligent pilot was operating the public conveyance and whose negligence was the cause of death. Section 22-20-4 can by no reasonable construction be construed as indicating a legislative intention to benefit corporations or individuals operating public conveyances, but rather to hold such privileged persons, permitted as they are to derive revenue from the public for their transportation, to the highest standard of care; the threat of punitive damage by way of forfeiture of the $10,000-payment being the instrument of public policy used by the legislature to discipline the operators and owners of public conveyances in maintaining the desired high standard of care.

The constitutionality of the construction given to Sections 22-20-1 and 22-20-4 NMSA 1953 by both the District Court of New Mexico and the United States Court of Appeals for the Tenth Circuit has never been considered by this Court.

The constitutionality of the construction of the statutes in this case turns on the single question: Would the granting to a pilot of immunity from liability for wrongful death only resulting from the negligent operation of a common air carrier be justified on any reasonable grounds of classification?

It must be borne in mind that the statute under consideration in the instant case is a survival statute wherein the cause of action arises on the date of injury, not the date of death, and it has been so held. (*Natseway* v. *Jojola*, 56 N. M. 793, 251 P. 2d 274). If the decision of the lower courts is permitted to stand it means that the personal representa-

tives of passengers of a common air carrier are denied the right to recover against the pilot thereof for injuries resulting in death while the courts would at the same time allow recovery against the pilot of a private plane and against the pilot of a common air carrier if said pilot was also the owner (*White* v. *Montoya*, 46 N. M. 241, 126 P. 2d 471), and against pilots of common air carriers for injuries not resulting in death. Such a result is an arbitrary and unreasonable classification and therefore is unconstitutional. It is a well-established principle of constitutional law that while a legislature has broad powers permitting it to classify persons without violating the Fourteenth Amendment of the United States Constitution, no classification that is arbitrary and unreasonable and not relevant to proper government purposes will be allowed to stand in the face of the equal-protection clause of the Fourteenth Amendment of the United States Constitution.

There are many cases supporting this basic proposition. We will cite but a few of them, not to unduly burden the Court with needless citations. The following cases are in point:

Morey v. *Doud*, 354 U. S. 457 (1957);
Skinner v. *Oklahoma*, 316 U. S. 535 (1942);
Truax v. *Corrigan*, 257 U. S. 312 (1921);
Truax v. *Raich*, 239 U. S. 33 (1915);
Northern Pacific Ry. Co. v. *North Dakota*, 236 U. S. 585 (1915);
People v. *Gidaly*, 35 Calif. Ap., 2d Supp., 758 (93 P 2d 660);
Louis v. *Boynton*, 53 Fed. 2d 471;
Parlett Cooperative v. *Tidewater Lines*, 164 Md. 405, 165 A 313;
Milton v. *Bangor Ry.*, 103 Maine 218; 68 A 826.

Professor Corwin, one of the leading authorities on Constitutional Law, in his book "The Constitution and

What it Means Today" has this to say in regard to the equal protection clause of the Fourteenth Amendment (pp. 204 *et seq.*):

> "The clause does not automatically rule out legislative classifications. Indeed, substantially all legislation involves classification of some sort. What the clause appears to require today is that any classification of 'persons' shall be reasonably relevant to the recognized purposes of good government; * * *. Thus, in view of the special dangers to which the railroad business exposes the public, railroad companies should be required to stand the heavy expense of elevating their grade crossings."

In considering whether or not the interpretation of a statute violates the equal-protection clause of the Fourteenth Amendment, the Court may consider whether at the time of the enactment of the statute the legislature had a reasonable basis for the classification that is attacked as unconstitutional. In the instant case it is hard to imagine any reasonable basis for classifying the pilot or driver of a common carrier of passengers as being properly immunized from liability for causing the death of a passenger either through wilfull act or negligence. (Both of these classes of acts are covered in Section 22-20-1 under which the instant suit is brought.) It is less possible to imagine such a classification when at the same time, as has been interpreted by the court below, such a pilot would be liable under Section 22-20-1 if he happened also to be the owner of the common carrier or if he were the pilot of a private passenger plane or if the passenger didn't die but was only injured.

The wording of Section 22-20-4 indicates clearly that the legislature recognized at the time these sections were enacted that it was in the public interest, in the interest

of good government, that public or common carriers of passengers should be held to a high standard of care, higher than the occasional private carrier of passengers, and for that reason they imposed a forfeiture upon such common carriers of passengers where either death was caused by defect in the equipment or where the operator or driver was negligent. Thus the legislature hoped to make the common carrier more careful in keeping its equipment in a safe operating condition and more conscientious in hiring operators, selecting the most capable and keeping them to a high standard of care in the operation of the equipment. With that as a background it is hard to conceive that the legislature at the same time felt that the operator should be immunized from liability for either negligently or wilfully causing death. Rather would the legislature have imposed greater liability on such operators than less. It is therefore inconceivable that the legislature intended the statute to have the meaning given it by the district court and the Court of Appeals.

In the case of *Trujillo* v. *Prince*, 42 N. M. 337, 78 P 2d 145 (1938), the Court, at page 345, said:

> "• • • our Death by Wrongful Act Statute has to some degree an objective of public punishment and was designed in part at least to act as a deterrent to the negligent conduct of others and thereby promote the public safety and welfare."

In the case of *Whitmer* v. *El Paso & S. W. Co.*, 201 Fed. 193 (5th Cir. 1912), the Court said, at page 198:

> "The statutes allowing damages for wrongful act or negligence causing death have for their purpose more than compensation. It is intended by them, also, to promote safety of life and limb, by making negligence that causes death costly to the wrongdoer."

It is only when the reasons are compelling ones of public policy that immunity from liability may be granted to a special class. See *Chicago M & St. Paul R. R.* v. *Westby*, 178 Fed. 619 (8th Cir. 1910), wherein the Court held a statute of South Dakota invalid which abolished the defense of contributory negligence in all suits by employees against common carriers whether said employees were engaged in a hazardous occupation or not.

In the case of *Truax* v. *Corrigan*, cited above, Chief Justice Taft said:

> "To sustain the distinction here between the ex-employees and other tort-feasors in the matter of remedies against them, it is contended that the legislature may establish a class of such ex-employees for special legislative treatment. In adjusting legislation to the need of the people of a state, the legislature has a wide discretion, and it may be fully conceded that perfect uniformity of treatment of all persons is neither practical nor desirable, that classification of persons is constantly necessary, and that questions of proper classification are not free from difficulty. But we venture to think that not in any of the cases in this court has classification of persons of sound mind and full responsibility having no special relation to each other, in respect to remedial procedure for an admitted tort, been sustained. Classification must be reasonable. As was said in *Gulf, C. & S. F. R. Co.* v. *Ellis*, 165 U. S. 155, 41 L. Ed. 668, 17 Sup. Ct. Rep. 255, classification 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without such basis.' "

In *Noel* v. *Menninger Foundation*, 175 Kan. 751, 267 P 2d 934 (1954), the Court said, at page 943:

> "To exempt charitable and non-profit corporations from liability for their torts is plainly contrary

to our constitutional guaranties, Bill of Rights, Sec. 18. It gives to certain favored ones, selected arbitrarily, immunity from that equal liability for civil wrongs, which is a sign of equality between citizens. It undertakes to clothe charitable and non-profit organizations with special privileges denied to other corporations and society. It takes from individuals the right to assert in the courts claims against all who tortiously assail their persons and property and to recover judgment for the injuries done. It prevents all persons from having recourse to law for vindication of rights or reparation for wrongs against the privileged charitable, non-profit organization. It frees one set of corporations from obligations to which their competitors, and individuals, are subjected. In short, it destroys equality and creates special privilege."

See also *West* v. *Jaloff*, 113 Ore. 184, 232 P 642 (1925), wherein the Oregon Supreme Court held that a statute giving an ambulance the right of way over other vehicles did not relieve the driver from liability for negligence.

In the case entitled *In Re Opinion of the Justices*, 211 Mass. 618, 98 N. E. 337 (1912), the Court, in a case analagous to that at bar, stated:

"It gives to certain favored ones, selected arbitrarily, immunity from that equal liability for civil wrongs which is a sign of quality between citizens and residents. It undertakes to clothe combinations of employers and laborers with special power denied to other employers and laborers and other members of society. In another aspect, it deprives all individuals and associations other than those named, of the protection to safety, liberty and property, which any free government must secure to its subjects."

Similarly *In Re Opinion of the Justices*, 220 Mass. 627, 108 N. E. 807 (1915), the Supreme Judicial Court of Massa-

chusetts held unconstitutional a proposed statute prohibiting railroad corporations from discharging employees by reason of information touching conduct until the employees concerned had been given an opportunity to make a statement in the presence of the person or persons furnishing the information. The court said at 108 N. E. 808:

> "Absolute equality before the law and equal protection of the laws are principles established by the Constitution of the United States and of this Commonwealth. Opinion of the Justices, 211 Mass. 618, 98 N. E. 337. While reasonable classifications may be made by the Legislature in the interests of the public health, public safety and public morals, yet there must be some rational relation between the object to be attained and the classification, in order that it may not violate the constitutional guaranty that all persons, including corporations, shall be equal in the protection afforded by the laws. Many such classifications have been upheld as not contrary to this principle. (Citing cases.) But the proposed bill has no reference to the safety of the travelling public. It applies only to one kind of common carrier and not to others. It imposes a burden upon railroads from which all other common carriers and employers of labor are free. It singles out employes of railroads and confers upon them immunities and advantages enjoyed by no others who work for individuals and corporations, in a particular which has no relation to the kind of employment engaged in by them. In both respects it tends to destroy equality. It creates of railroad employes a specially privileged class, and subjects railroads, to a matter having no special relation to their business as distinguished from other kinds of business, to obstacles and burdens from which other employers are free. There is strong grounds for the conclusion that the selection of railroads as the sole object of severely criminal legislation as to a matter of having no particular relation to the management of railroads

would be arbitrary and hence unwarrantable under the constitution." (Citing cases.)

It is submitted that the supposed object of the legislation is not accomplished by the classification, and even if there were a substantial difference between a carrier's operator and an owner or other operator of a vehicle, there is no reasonable relation to the object of the legislation. If the employee is left liable for injuries to persons, the legislation would accomplish the unsocial and abhorrent object of making the employee aware that if an accident is inevitable, the more deaths compared to injuries that result, the less his liability for damages. In case of an accident, therefore, regardless of his appraisal as to his own fault, his personal financial interest would be best served by rendering aid to those with minor injuries and withholding his aid from those who would probably die for lack of it.

The equal protection clause forbids such a classification which has no reasonable basis and no reasonable relation to the object, whether based on the police power or on the power to regulate carriers. 12 *Am. Jur.*, Constitutional Law, Sections 504-5-7, 532.

Conclusion.

It is respectfully submitted that the petition should be granted, and the Writ issue.

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Appendix A.

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT.

NOVEMBER TERM—1958.

ALICE S. CAMPBELL, as Administratrix of the Estate of WILLIAM R. CAMPBELL, also known as William Richard Campbell, deceased; and TOWNSEND L. SCHOONMAKER, as Administrator of the Estate of ALFRED G. SCHOONMAKER, also known as Alfred Garrison Schoonmaker, Jr., deceased,

Appellants,

vs.

ROLANDO J. MATTEUCCI, Administrator of the Estate of IVAN R. SPONG, deceased,

Appellee.

Filed United States Court of Appeals, Tenth Circuit. Nov. 29, 1958 Robert B. Cartwright, Clerk.

Number 5951.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW MEXICO.

EDMUND H. H. CADDY and MILTON S. SELIGMAN for Appellants.

JAMES C. RITCHIE and JACKSON G. AKIN (RODEY, DICKASON, SLOAN, AKIN & ROBB was with them on the brief) for Appellee.

Before BRATTON, Chief Judge, and PICKETT and BREITENSTEIN, Circuit Judges.

PER CURIAM:

This was another action arising out of the crash of an airplane near Albuquerque, New Mexico, on February 19, 1955. The airplane was owned and operated by Trans World Airlines, Inc., a common carrier. Ivan R. Spong was the pilot in charge of the flight, and William Richard Campbell and Alfred Garrison Schoonmaker, Jr., were passengers. All three were killed. The administratrix of the estate of Campbell and the administrator of the estate of Schoonmaker instituted this action against the administrator of Spong to recover damages for wrongful deaths and for the value of certain personal property lost. The court entered judgment dismissing the action insofar as recovery for the deaths of Campbell and Schoonmaker were concerned, and awarding recovery for the reasonable value of the personal property lost. Plaintiffs appealed.

On the authority of In Re Reilly's Estate, 63 N. M. 352, 319 Pac. (2d) 1069, Tilly *v.* Flippin, 237 F. (2d) 364, and Schloss *v.* Matteucci, CA-10 ..... F. (2d) ....., decided October 9, last, the judgment is

Affirmed